



May 21, 2025

Via Electronic Submission

Christopher Kirkpatrick
Secretary of the Commission
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

RE: *CFTC Request for Comment on the Trading and Clearing of “Perpetual” Style Derivatives*

Dear Mr. Kirkpatrick:

Intercontinental Exchange Inc., on behalf of itself and its subsidiaries (collectively “ICE”), appreciates the opportunity to respond to the Commodity Futures Trading Commission’s (“CFTC” or “Commission”) request for comments on the trading and clearing of “perpetual” style derivatives (the “RFC”).¹ ICE operates regulated marketplaces for the listing, trading and clearing of a broad array of derivatives contracts and financial instruments, such as commodities, interest rates, foreign exchange and equities as well as corporate and exchange-traded funds, or ETFs. We operate multiple trading venues, including 13 regulated exchanges and six clearing houses, which are strategically positioned in major market centers around the world, including the U.S., U.K., European Union, or EU, Canada, Asia Pacific and the Middle East.

We appreciate the Commission’s approach in soliciting feedback on a range of topics related to perpetual derivative contracts. Perpetual derivatives present unique risks and attributes which should be carefully considered. The CFTC should use the RFC as an initial starting point of discussion, but any interpretation or characterization should be done through a formal rulemaking process. A formal rulemaking will provide the necessary regulatory clarity and facilitate innovation.

ICE notes the importance of defining what constitutes a perpetual derivative as this determines whether the product is a swap or a future. To that end, ICE is concerned about DCMs launching perpetual futures contracts while an active RFC is ongoing. The public comment process is designed to solicit meaningful input from market participants and the CFTC is potentially undermining the value of this process by allowing DCMs to list these contracts before receiving and analyzing public feedback. The CFTC must ensure that innovation does not compromise the public comment process which brings transparency and diverse viewpoints to the rulemaking process.

¹ CFTC Request for Comment on the Trading and Clearing of “Perpetual” Style Derivatives (Release Number 9069-25) (April 21, 2025).



Recommendations

Perpetual contracts should be characterized as swaps.

The CFTC correctly took the position that perpetual contracts are swaps under the Commodity Exchange Act (“CEA”) in its enforcement action against Binance.² In arguing this position, the CFTC relied on the fact that Binance customers did not exchange the underlying digital asset but instead had contracts that provided synthetic exposure to the price of a digital asset that may be cash settled against another digital asset. The CFTC also cited the contract specifications that require counterparties to exchange payments based on a price index for the underlying asset (commonly known as the “funding fee”) and that perpetual futures strongly resemble contracts for differences (“CFD”) which are classified as swaps. Ultimately, the Commission concluded that the swaps definition was met because the contracts required counterparties to periodically exchange payments based on the price of the underlying without exchanging the asset that incorporates the transferred risk.

Given the structure and characteristics of perpetual contracts, ICE agrees with the Commission’s reasoning and conclusion that perpetual derivatives are swaps because perpetuals charge a percent of notional, provide cash flows for economic exposure to the underlying, require a cost to carry through a funding rate and can be closed out for failure to make payment; all of which are characteristics of swap contracts. Further, similar to swaps, perpetual derivatives do not converge with the physical market and, thus, do not provide commercial risk management features as commercial hedging participants rely on instruments with expiries which converge with physical markets. In addition, perpetual derivatives reliance on funding rates decouples them from physical supply and demand. Based on these attributes, ICE’s view is that perpetuals should be characterized as swaps.

The CFTC should clarify the status of perpetuals as swaps and address related implications through a formal rulemaking process.

The CFTC and SEC should engage in a formal rulemaking to explicitly include perpetuals as part of the swap definition.³ Section 712(d)(1) of the Dodd-Frank Act provides that the CFTC and the SEC, in consultation with the Board of Governors of the Federal Reserve System (“Board”), shall jointly further define the terms “swap” and “security-based swap.” The CFTC and SEC have engaged in an extensive rulemaking process to clarify these terms.⁴

We note that the Swap Final Rule did not specifically address perpetual derivatives and as such ICE believes an amendment to the Swap Final Rule would be the appropriate way to clarify the status of perpetual contracts. A formal rulemaking would also give the agencies the opportunity

² CFTC v. Changpeng Zhao et al., 1:23-cv-1887 at 14 (Sept. 22, 2023).

³ A perpetual contract referencing a single security or narrow-based index of securities would similarly be regarded as a security-based swap.

⁴ See Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, Final Rule, 77 Fed. Reg. 48,208 (Aug. 13, 2012) (“Swap Final Rule”).



AMSTERDAM ATLANTA CALGARY CHICAGO HOUSTON LONDON NEW YORK SINGAPORE WINNIPEG

to address any other regulatory issues that may arise from the treatment of perpetual derivatives as swaps.

Conclusion

ICE appreciates the opportunity to comment on the RFC and respectfully requests that the Commission consider its comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kara Dutta'.

Kara Dutta
VP, Head of Legal, US Futures Exchanges & Clearing
Intercontinental Exchange Inc.

cc: Honorable Acting Chairman Caroline D. Pham
Honorable Commissioner Christy Goldsmith Romero
Honorable Commissioner Kristen N. Johnson
Honorable Commissioner Summer Mersinger